United Garment Workers of America, AFL–CIO *and* Warren Sherlock. Cases 3–CA–14240, 3–CA–15120, and 3–CA–15207

October 16, 1990

SUPPLEMENTAL DECISON AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 19, 1990, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent Union and the General Counsel filed exceptions and briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Garment Workers of America, AFL–CIO, Hermitage, Tennessee, its officers, agents, and representatives, shall pay to Warren Sherlock $25,677.60, plus interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and shall pay $2,614.15 to the United Garment Workers of America Retirement and Severance Fund.[4]

IT IS FURTHER ORDERED that the Respondent, its officers, agents, and representatives, shall take the action set forth in the judge's recommended Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

''(b) Make Warren Sherlock whole for losses he incurred, if any, as a result of the Respondent's unlawful institution of a rule prohibiting employees from engaging in outside employment, in the manner set forth in the supplemental decision.''

3. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule and administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that weekly car allowance and per diem payments made to international representatives are properly included in backpay as emoluments of value arising out of the employment relationship. *Boyer Ford Trucks*, 270 NLRB 1133 (1984), relied on by the Respondent, is distinguishable in that there the employer, who provided its sales staff with car and gasoline allowances, monitored sales calls made by the salesmen at all times and required receipts showing at least $50 in gasoline purchases in order for them to receive the monthly gasoline allowance. Here, in contrast, the Respondent, while requiring international representatives to file weekly reports summarizing their contract administration and organizing activities, does not distinguish between work done onsite and that done at home or set minimum expenditures or otherwise condition receipt of the allowances at least for representatives who have their own vehicles available for use in their work.

[3] We find merit to the General Counsel's exceptions regarding the judge's failure to direct that the Respondent, make Sherlock whole for losses, if any, he sustained as a result of the discriminatory institution of the prohibition against outside work. Accordingly, the recommended Order is revised to provide for such backpay, with any such amounts to be ascertained in the compliance proceeding. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1989).

Further, we find that where, as here, an employer repeatedly retaliates against an employee for resorting to Board processes, a broad order is warranted. *P.I.E. Nationwide*, 295 NLRB 382 (1989). In the instant case, the Respondent terminated Sherlock for threatening to file charges with the Board on behalf of himself and another international representative (Case 3–CA–14240); offered him reinstatement under conditions that were explicitly more onerous and implicitly designed to generate failure and thereby create grounds for a second termination; began issuing letters critical of his performance within 2 weeks of his reinstatement; and issued Sherlock warnings, including a ''final warning,'' after Sherlock advised that he had filed new charges as a result of the prohibition against outside employment that was instituted and applied to him. We shall modify the recommended Order in accordance with the foregoing.

[4] The payment to the Retirement and Severance Fund shall be made in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 fn. 7 (1979).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit our employees from engaging in outside employment, or threaten them because they have such outside employment, because they filed charges with the Board.

WE WILL NOT issue warnings to our employees, or otherwise threaten them, because they filed charges with the Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Warren Sherlock whole for losses he incurred, if any, as a result of our unlawful institution of a rule prohibiting employees from engaging in outside employment, with interest.

WE WILL remove from our files any reference to the threats or warnings to Sherlock and we will notify him that this has been done and that evidence of these

threats and warnings will not be used as a basis for future actions against him.

UNITED GARMENT WORKERS OF AMERICA, AFL–CIO

Robert A. Ellison, Esq., for the General Counsel.
Richard Markowitz, Esq. (Markowitz & Richmond), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 30 and 31, 1990, in Albany, New York. The order further consolidating the compliance proceeding with the unfair labor practice proceeding issued on November 9, 1989.[1] This Order consolidated the compliance specification and notice of hearing, which issued on August 30, and was based on a decision in Case 3–CA–14240 which issued on March 2 and was affirmed by the Board at 295 NLRB 411 with the unfair labor practices alleged in Case 3–CA–15120, which was filed by Warren Sherlock on August 7, and the unfair labor practices alleged in Case 3–CA–15207, which was filed by Sherlock on October 3. The consolidated complaint alleges that United Garment Workers of America, AFL–CIO (Respondent), violated Section 8(a)(1)(4) of the Act when (on about July 26), it instituted a rule against Sherlock, prohibiting him from engaging in outside employment, and on about July 26 and September 6, in enforcement of this rule, threatened him with termination, and (on about June 20, August 9 and September 26) issued written warnings, including a ''final warning'' to Sherlock, all in retaliation for his Board proceedings.

On the entire record, including my observation of the witnesses and the briefs received from the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a labor organization with its headquarters in the City of Hermitage, State of Tennessee, represents employees in bargaining with employers located in various states and it annually collects and receives dues and fees in excess of $250,000 transmitted directly to its headquarters from constituent locals and members located outside Tennessee. It was previously found, is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. BACKGROUND

Due to the nature of the allegations of the consolidated complaint, as well as Respondent's defense to the compliance specification that it made a valid offer of reinstatement to Sherlock on August 29, 1988 (rather than the reinstatement date of March 27 alleged in the compliance specification) it is necessary to examine the history of this dispute with some specificity.

Sherlock began his employ with the Respondent in 1976 as an international representative, covering the northeastern area of the United States, from about Vermont to Maryland. In that position, he serviced the locals in the area through negotiations, grievance and arbitration handling, contract administration, and organizing. During a portion of this period, he was on Respondent's executive board, and from August 1986 to August 1987, he was the director of organizing for Respondent. The turning point in his relationship with the Respondent was Respondent's convention in August 1987 when Sherlock was defeated by Earl Carroll for the post of general president of Respondent; at the same time, Calvina Little was reelected secretary-treasurer. A few days later, Carroll informed Sherlock that he was replacing him as director of organizing and that Sherlock would return to the northeast as international representative, an area with 9 local unions and about 496 members. Carroll informed Sherlock that as there wouldn't be enough work to keep him busy full time, he expected Sherlock to spend about 50 percent of his time organizing. At the time that he returned as international representative, his salary was reduced from $558 a week to $485 a week, plus a $63 a week car allowance and $25 a week per diem.

In about January 1988, Sherlock heard that Respondent had given raises to other of its international representatives; he discussed this with Lucy Gibby, another International representative, and the one who nominated him for general president at the August 1987 convention. She also had heard of such raises, but had not received one. In February 1988, on his weekly report to Respondent, Sherlock asked if staff members would be receiving wage increases. Having received no reply, on March 1, Sherlock wrote to Carroll and Little about a raise, stating that if he and Gibby do not receive a reply by March 11, 1988, they would ''file charges against the International Union.'' The letter was received by Respondent on March 3, 1988. By letter of the same date, Carroll wrote Sherlock that he was being terminated effective March 12, 1988: no reason was given. At the hearing, Respondent defended that Sherlock's discharge was due to his poor performance as an organizer and his tardiness in transmitting dues to Respondent. The administrative law judge dismissed this testimony of Carroll and Little as a ''fictional scenario'' and found that although Sherlock was not successful in his organizational attempts ''the record is equally clear that no one in the Union appears to have performed any differently than Sherlock or achieved any better results than Sherlock . . . .'' The administrative law judge concluded that the discharge was in retaliation for the March 1, 1988 letter, in violation of Section 8(a)(1) and (4) of the Act. This determination was affirmed by the Board.

III. THE BACKPAY FACTS & CONCLUSIONS

The backpay specification alleges that the backpay period runs from March 12, 1988, through March 27; March 12, 1988, is the date that his discharge became effective as per Carroll's letter of March 3, 1988, and March 27 is the date he returned to work pursuant to an offer of reinstatement from Respondent. However, Respondent disputes these dates, as well as having other defenses to the backpay specification. Respondent initially alleges that although Sherlock's employment with Respondent ceased on March 12, 1988, he was paid through March 19, 1988, and that is therefore the date

[1] Unless indicated otherwise, all dates referred to relate to the year 1989.

his employment effectively ended. More significantly, Respondent alleges that although Sherlock returned to work on March 27, his backpay should have ended on August 29, 1988, when he refused an allegedly valid reinstatement offer. Additionally, Respondent alleges that it should not be liable in this backpay proceeding for a $63 weekly car allowance and a $25 weekly per diem payment that its International representatives receive and that Sherlock did not make a reasonable search for interim employment.

As stated, supra, Carroll's termination letter to Sherlock dated March 3, 1988, states: ''This is to advise that as of week ending March 12, 1988, your service will no longer be required. Enclosed herewith is two weeks severance pay.'' Respondent's payroll records establish that for the ''pay period'' ending March 5, 1988, Sherlock was paid $485, plus $63 car allowance, $55 per diem, $12.32 reimbursement for other expenses, less the usual deductions, for a net payroll check of $415.71. For the week ending March 12, 1988, with the same gross pay, only a $25 per diem and no reimbursable expenses, his check was $373.39. For what is listed is ''pay period'' of March 19, 1988, with the $485 weekly gross, $63 and $25 car allowance and per diem, and $2.05 reimbursable expenses, less the usual deductions, his net pay was $375.44. Together with that check, Sherlock received 2 weeks severance pay, $485 per week, with no car allowance, per diem or reimbursable expenses, less the usual deductions for a net total of $570.78. Respondent initially alleges that since Sherlock's last check in March 1988 was for the ''pay period'' ending March 19, 1988, his backpay should begin on that date rather than March 12, 1988. However, Sherlock's uncontradicted testimony is that Respondent's payroll is 1 week behind, and that the pay listed as being for the pay period of March 19, 1988, was actually for the pay period of March 12, 1988. Supporting this testimony is the bill Sherlock submitted to Respondent for his pay for the week ending March 12, 1988; it is identical in every respect to what Respondent's payroll lists as his pay for the pay period ending March 19, 1988, and is for a different amount than all of his prior paychecks. I therefore find that what Respondent's payroll refers to as the pay period of March 19, was actually Sherlock's pay for the week ending March 12, and that is the date that backpay begins to run.

At the hearing, Respondent also alleged that backpay should not have begun until 2 weeks later because Respondent paid Sherlock 2 weeks' severance pay with his final check. However, this gross amount, $970, was taken into consideration by General Counsel and was included in Sherlock's interim earnings for the first quarter of 1988. This was a more appropriate way of deducting this amount from Respondent's total obligation than pushing the backpay period ahead 2 weeks, since the weeks' severance pay did not include car allowance or per diem. As Respondent was therefore not prejudiced, this allegation is also rejected.

Respondent next alleges that the $63 weekly car allowance and the $25 weekly per diem should not have been included in Sherlock's backpay since these amounts represent reimbursement for job related expenses and as Sherlock was not employed during the backpay period, he incurred no reimbursable expenses. The undisputed evidence establishes that the $63 car allowance reimburses the international representatives for the use of their automobiles: Respondent provides each of these employees with a gasoline credit card (chargeable to Respondent) to pay for gasoline. Each of Respondent's international representatives but one [2] receive this allowance from Respondent and they receive it even if they are on vacation, or not using their automobile, for the period. The $25 weekly per diem allowance represents reimbursement to the international representatives to cover extra expenses, such as meals, for periods when they are out of town.

If they have to stay overnight, Respondent provides them with a credit card to cover the hotel and reimburses them an additional $20 daily for meals. Carroll testified that both the $63 weekly car allowance and the $25 weekly per diem are actually annual figures that Respondent pays to its employees on a weekly basis. The evidence establishes that the weekly car allowance and per diem payments were made to the employees whether they used their automobiles or were out of town, and there is no evidence that Respondent ever monitored the employees' activities in this regard. The only exception to these payments was that the representative in Toronto did not need, or have, an automobile and therefore never received these payments, and Sherlock did not receive these payments for a month while his automobile was not usable and Respondent, in lieu of these payments, rented a car for him at their expense. As the Board stated in *W. C. Nabors Co.*, 134 NLRB 1078, 1086 (1962), a make whole remedy ''includes emoluments of value arising out of the employment relationship; in addition to or supplementary to the actual rate of pay per hour worked or per unit produced.'' As the court of appeals stated in enforcing *W. C. Nabors*, 323 F.2d 686 at 690 (5th Cir. 1963):

> [T]he ''make whole'' concept does not turn on whether the pay was wholly obligatory or gratuitous, but on the restoration of the status quo ante. ''Back pay'' as used in section 10(c) includes the moneys, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of the unlawful discrimination.

I am mindful of *Boyer Ford Trucks*, 270 NLRB 1133 (1984), which I find distinguishable from the instant matter. As I find that the car allowance and per diem payments were prerequisites of the international representatives' positions, I find that these payments were properly included in the backpay specification. *Full Line Distributors*, 243 NLRB 758 (1979); *Electrical Workers IBEW Local 401 (Stone & Webster)*, 266 NLRB 870 (1983).

Respondent next alleges that Sherlock did not make an adequate search for interim employment. As will be discussed more fully below, beginning in September 1987, Sherlock began working part-time for Thermal Associates (Thermal), a heating and air conditioning contractor. Sherlock's brother was employed at Thermal and he introduced Sherlock to Thermal's owner, who offered him a part-time job at $6.50 an hour, which he accepted. Thermal's records produced by Sherlock establish that he worked 161 hours for Thermal from about January 1, 1988, through March 6, 1988.

[2] Respondent's international representative located in Toronto, Canada, does not use an automobile. Additionally, in 1977, Sherlock's automobile sustained extensive damage and it was another month before he could obtain a replacement car. During this period, Respondent rented an automobile for him (at their expense) in lieu of the $63 weekly car allowance.

When he was fired by Respondent on March 7, 1988, he told the owner of Thermal that he could not afford to continue working there at $6.50 an hour; at that time he was not offered a raise and ceased working for Thermal in order to devote his full time to look for comparable replacement employment. Sherlock did not work for Thermal from March 7 through mid September 1988. By September 1988, he had not yet obtained replacement employment and his unemployment insurance was ending; at that point he decided: ''making even $6.50 an hour was better than making nothing at all.'' When Sherlock reapplied to work at Thermal in September 1988, he requested $8.50 an hour and, to his surprise, he was rehired at that rate, beginning the week ending September 21, 1988. From September 1988 through March, he worked approximately 40 hours a week at $8.50 an hour for Thermal.

Sherlock also testified to his search for interim employment subsequent to his discharge: on March 11, he filed an application and resume with Heber Associates, a job placement service, requesting a position in the labor relations field. They were unable to locate employment for him. On March 24, 1988, he filed for unemployment compensation with the New York State Unemployment Division. They had no jobs available in the field he was applying for, nor did they have any jobs that paid in excess of $6 or $7 an hour. On March 30, 1988, Sherlock filled out an employment application for the Electric Boat Division of General Dynamics Corporation in West Milton, New York. He had learned that they were adding a shift and he told them that he would accept any employment there because all positions there were high paying; he never received any response from them. In April 1988, he filled out an application of employment for a conductor's position with Amtrak in New Haven, Connecticut, after learning that they were increasing operations in the area. On May 5, 1988, he called Amtrak to be sure that they had not lost his employment application. On July 28, 1988, he had an interview with Amtrak for a position of ticket clerk in Rensselaer, New York; it never developed into a job offer. On July 20, 1988, he again went to the job placement service of New York State Unemployment Division; a clerk told him that they do not receive calls for his field of employment, but that he should look through their files, which he did. Nothing came of this, as well. During this period, he also spoke to union representatives in order to obtain contacts with union people in the area; this attempt was unsuccessful, as well. As stated, supra, in September 1988, he returned to work at Thermal; during the backpay period he was not offered any job other than by Thermal. Sherlock's interim earnings (solely from Thermal) are as follows:

3d Quarter 1988	$513.83
4th Quarter 1988	2049.48
1st Quarter 1989	2009.39

Innumerable cases, by now, have stated that an employer can mitigate his backpay liability by establishing that the claimant willfully incurred losses by unjustifiably refusing to accept new employment; this is, of course, an affirmative defense and it is the employer's burden to establish these facts. The mere fact that an individual had little or no success in locating interim employment is not enough to satisfy this burden; rather the employer must affirmative]y demonstrate that the employee ''neglected to make reasonable efforts to find interim work.'' *NLRB v. Coca Cola Bottling Co.*, 360 F.2d 569 at 575 (5th Cir. 1966). Additionally, a discriminatee is held only to reasonable exertions in this regard, not to the highest standards of diligence. In determining the enableness of a discriminatee's efforts, the employee's skills and qualifications, his age, and labor conditions in the area are factors to be considered. *Aircraft & Helicopter Leasing*, 227 NLRB 644 (1976).

I find that Respondent has not satisfied its burden of establishing that Sherlock failed to make an honest good-faith effort to find interim employment between March and September 1988. Initially, I note that it was not unreasonable for Sherlock to cease his employment with Thermal at the time of his discharge in order to devote his time to locating comparable interim employment. At $6.50 an hour, he would only earn $260 a week, less than half the weekly salary he had received from Respondent. This was therefore not comparable employment. *Mid-America Machinery Co.*, 258 NLRB 316 (1981). Additionally, I find that Sherlock made a reasonable attempt to locate interim employment between March and September 1988. The record establishes that 4 days after his termination, he applied at a job placement service and 2 weeks later, he registered with the New York State Job Service. The following week, he applied for work at General Dynamics and in April he traveled 200 miles to apply for employment with Amtrak. He later returned to the New York State Job Service and had an interview with Amtrak. In addition, he made approximately 14 telephone calls in furtherance of these applications. That he was unsuccessful does not detract from these attempts. Rather, his inability to locate comparable interim employment may have been caused by the high salary he had been receiving from Respondent and the fact that the area in which he was located had an economy where, apparently, jobs are difficult to find. Finally, Sherlock's good faith is further established by the fact that in September, realizing that his attempts to locate comparable employment had been futile, he returned to Thermal on an almost full-time basis.

The remaining defense on the issue, and the most significant dollar wise, is that backpay should have been tolled in July 1988, or subsequent thereto, when Respondent offered reinstatement to Sherlock. The issue in this regard is whether these represented unconditional offers of reinstatement to Sherlock's former position of employment. There were a series of letters from Carroll to Sherlock, together with some responses from Sherlock and the Board's Resident Office that must be considered in this regard.[3] By letter dated July 19, 1988, Carroll wrote to Sherlock:

> This communication constitutes an unconditional offer to reinstate you to employment as an International Representative of the United Garment Workers of America. Such reinstatement which is hereby offered to you will be effective Monday, August 1, 1988.
>
> You will receive a salary of $485.00 per week, the amount which you were receiving at the time of your termination. You will also receive automobile expenses and all of the other expenses which you were pre-

[3] In August 1987, after losing the election to Carroll, Sherlock told him that ''because of all this with the election that had been going on . . . we try to keep our communications in writing for the protection of both sides.'' As will be clear below, the parties followed this recommendation.

viously receiving and which are received by all other international representatives employed by the Union.

Your assignment, effective August 1, 1988, will be the organizing of the former Francis Heydt Manufacturing Co. plant which may now be known as Sac and Fox Industries, Idabel, Oklahoma. You had initiated organizing efforts at this plant in 1987, and I want them to be continued with the aim of securing sufficient authorization cards from employees at this plant so as to be able to obtain a National Labor Relations Board election or recognition from the employer.

I want you to take your automobile to Idabel, Oklahoma so that you will have the use of it there. The Union is willing to pay you reasonable airfare expenses to return to your home every other weekend, to go home on Friday and to return to Idabel on Monday, leaving your car in Oklahoma.

I am enclosing a pad of report forms which must be filed weekly by you with the General Office. The enclosed report forms detail your work and activities in this organizing campaign, and it will be expected that you file these reports weekly. I will monitor your progress in this campaign, and, hopefully, we can secure sufficient authorization cards within a reasonably brief period.

So that there will be no misunderstanding I do not want you to take your trailer to Oklahoma. I also do not believe that your wife should travel with you because this would interfere with your devoting your full-time efforts to organize this plant.

Please advise this office immediately of your acceptance of this offer.

Sherlock answered by letter dated July 26:

> This letter acknowledges your letter dated July 19, 1988. This letter also advises you that your offer has been refused as it is not a valid offer of reinstatement.

By letter dated August 11, 1988, Carroll wrote Sherlock:

> I have your communication of July 26, 1988 in which you state you are refusing the offer or reemployment made to you on the grounds that, in your opinion, it is not a valid offer of reinstatement. I must strenuously differ with your conclusion and assure you that the offer of employment made to you was made in good faith and consistent with the needs of this International Union and our Local Unions.
>
> As you are aware, in August 1987 you were reassigned to service Local Unions in the northeastern part of the United States together with International Representative Jeff Roberts. You were also directed to spend at least 50% of your time in organizing activities in this area.
>
> You were certainly aware that the work of servicing these Local Unions was nowhere near a full-time position. There are only eight (8) Local Unions in Pennsylvania and New York, and there are less than 500 members in these Local Unions. This International Union certainly does not need to have both you and International Representative Jeff Roberts servicing these Local unions. You are aware that International Representative Jeff Roberts has been servicing these Local Unions for several years prior to the termination of your employment.
>
> In my letter to you of August 26, 1987, I asked you to spend as much time as possible organizing new plants in the northeastern section of the United States. Your reports for an approximate six (6) month period indicate only several days in which you spent organizing, and one of those days was spent at a warehouse which has only a handful of people.
>
> It is my belief that your experience as an organizer for our International Union should be utilized in your performance of duties as international representative for the United Garment Workers of America. Therefore, in my letter of you of July 19, 1988, I directed that you should be assigned to the organizing of the former Francis Heydt Manufacturing Co. plant in Idabel, OK where you spent considerable time in November and December 1986 and in April, May, June and July 1987. You are familiar with this area and undoubtedly have contacts with employees who work at this plant, and this is the reason why I made this assignment.
>
> I regret your view that you did not receive a valid offer of reinstatement. This is simply incorrect since it was my intention to offer you reinstatement as international representative of this Union to the position which you previously held. If you believe the offer was not valid because you were not assigned to the northeastern part of the United States, you must recognize that international representatives are subject to assignment by the General President, and there is simply not enough work in the area near your home to justify a full-time representative in that area. You are aware that we have only two (2) Local Unions in the state of New York and they have approximately a total of twenty-five (25) members.
>
> I consider it unfortunate that you did not accept the offer of reinstatement made to you. It was my intention to return you to the position of an international representative for this International Union and to permit you to exercise in full the duties and responsibilities of that position.

By letter dated August 19, 1988, Carroll again wrote to Sherlock:

> This communication is intended to clarify and restate the unconditional offer to reinstate you to employment as international representative of the United Garment Workers of America which offer was made in my letter to you of July 19, 1988. Such reinstatement is to be effective Monday, August 29, 1988.
>
> You will receive a salary of $485.00 per week, the amount which you were receiving at the time of your termination. You will receive automobile expenses and all other expenses which you previously were receiving and which are received by all other international representatives employed by this Union.
>
> Your immediate assignment, effective August 29, 1988, will be to participate with International Representative Jeffrey Roberts in the servicing of Locals 110, 140, 222, 233, 117, 283 and 482. In addition to this activity, and in accordance with my letter to you of August 26, 1987, you are assigned to engage in the

organizing of new plants in the northeastern portion of the United States.

In my letter to you of August 26, 1987, I advised you that you were reassigned to the aforementioned Local Unions, but, as you yourself recognized, this was not enough work to keep you fully occupied. In my letter to you of August 26, 1987, I requested that you engage in organizing new plants in the northeastern section of the United States. Unfortunately, your reports in the six (6) month period between September 1, 1987 and March 1, 1988 indicate very little such organizing activity, and I am not aware of any organizing activity in which you successfully engaged during that period of time.

You are certainly aware that the General President of the United Garment Workers of America has the right to assign International representatives to engage in organizing or servicing work in various parts of the country. So that there will be no misunderstanding, it should be clearly understood that if you are not successfully pursuing organizing activities in the northeastern part of the United States, you will be subject to such assignment since the servicing of the above-mentioned Local Unions should not take more than one and a half weeks per month.

I have already forwarded to you a pad of report forms for organizing activity which must be filed weekly by you with the General Office. I am enclosing a pad of reporting forms for servicing work, and it will be expected that you file both these reports weekly.

Please advise this office immediately of your acceptance of this offer.

By letter dated August 24, 1988, Thomas Sheridan, the Resident Officer of the Board's Albany Office wrote counsel for Respondent:

This letter is with regard to the issue of whether General President Earl E. Carroll's August 19, 1988 letter to Warren Sherlock constitutes a valid unconditional offer of reinstatement to him. The first paragraph on the second page of the letter appears to contemplate that Sherlock is liable to be reassigned to any part of the country in the event his organizational efforts do not prove successful. According to Sherlock, to his knowledge no international representative has ever been subject to being reassigned because organizational efforts did not turn out to be successful. Sherlock has also raised questions regarding the report forms sent to him and whether other international representatives are required to fill out such reports. He states he is not aware of any such reporting form requirement apart from the forms he regularly sent to the International office in the past.

Under the above circumstances the August 19 letter cannot be considered a valid unconditional offer to Sherlock of reinstatement to his former position of employment. You have already been advised by Board Agent Horowitz as to the reasons why Carroll's July 19,1988 letter did not constitute a valid unconditional offer of reinstatement to Sherlock. I remain willing to discuss settlement of the case once Respondent makes a valid, unconditional offer of reinstatement to Sherlock.

By letter dated March 20,[4] Carroll wrote to Sherlock:

This communication is intended to repeat the unconditional offer to reinstate you to employment as an International Representative of the United Garment Workers of America which offer was set forth in my letters to you of July 19, 1988 and August 19, 1988. Such reinstatement is to be effective March 27. 1989.

You will receive a salary of $485.00 per week, the amount which you were receiving at the time of your termination. You will receive automobile expenses and all other expenses which you previously were receiving and which are received by all other International Representatives employed by this Union.

Your immediate assignment, effective March 27, 1989, will be to participate in the servicing of Locals 110, 140, 222, 233, 117, 177, 283 and 482. In addition to this activity, and in accordance with my prior correspondence with you, you are assigned to engage in the organizing of new plants of the northeastern portion of the United States. It is expected that your organizing activities will take at least 50% of your time and very likely more than 50% of your time.

I already forwarded to you a pad of reporting forms for organizing activity which must be filed weekly by you with the General Office. I have also forwarded to you a pad of reporting forms for servicing work, and it will be expected that you file both these reports weekly.

Please advise this office immediately of your acceptance of this offer.

Sherlock answered by letter dated March 25, inter alia:

This letter acknowledges receipt of your letter dated March 20, 1989.

I accept your unconditional offer of reinstatement with the understating [sic] that the conditions in your previous letters are no longer in effect.

This acceptance in no way is intended to express or imply any withdrawal of case 3-CA-14240 pending with the National Labor Relations Board, or any other rights which I may have through the National Labor Relations Board or Civil Court.

Understanding that I have been out of touch with the Northeast area for over a year, and understanding that there are pending negotiations, I will need to spend considerable time updating myself with the locals, preparing for negotiations and negotiating. With that in mind, I believe that servicing must be the priority in my schedule until negotiations are completed.

For the future I will be handling all communications with the Union by letter, and will follow up any phone conversations by letter. For our mutual protection I request that the Union do the same.

I am ready to start servicing as soon as I receive the Union supplied credit cards for gas and motel expenses.

[4] The administrative law judge's decision in the underlying case issued on March 2.

> Please advise me immediately if any of the above suggestions or requests are not acceptable, or if you have any questions regarding this letter.

Finally, by letter dated March 31, Carroll wrote Sherlock:

> This will acknowledge receipt of your communication of March 23, 1989 accepting this Union's unconditional offer of reinstatement to the position of International Representative. You will be subject to the same rules and conditions which apply to all International Representatives employed by this Union. You will be expected to comply with directions given to you by the undersigned and by the General Secretary-Treasurer.
>
> You have been advised to secure copies of all communications with Locals 111, 140, 222, 233, 117, 177, 283 and 482, together with copies of all collective bargaining agreements, from International Representative Jeffrey Roberts. You are also directed immediately to begin servicing the previously mentioned Local Unions. There is absolutely no reason to await receipt of Union supplied credit cards since you may use your own credit card or pay cash and receipts will be honored.
>
> I cannot agree that you will need to spend considerable time updating yourself with the Local Unions, preparing for negotiations or negotiating. You are directed that the most important portion of your schedule is to be devoted to organizing new plants. Servicing is not a priority in your schedule. Rather, your most important priority and one which we expect you to fulfill, will be the organizing of employees in new plants and the addition of new members to this International Union.
>
> Obviously, such organizing activity can be carried out in conjunction with your servicing of existing Local Unions. Clearly, the Local Unions are not to be neglected, but you can certainly engage in organizing activities in those areas where Local Unions are in existence.
>
> It is absolutely imperative that your organizing efforts result in the addition of new members in the area you are servicing. You were advised of this necessity as early as August 1987, and you agreed to devote at least 50% of your time to organizing. It will be expected that you fulfill this commitment, and we trust that your organizing efforts will be successful and will result in the addition of new members for the International Union in the area you are servicing.

Sherlock testified that he refused Carroll's reinstatement offer dated July 19, 1988, for a number of reasons; for about a 9-month period prior to being elected general president of Respondent, Carroll was acting president, and, in that position, assigned Sherlock to organize a plant in Idabel, Oklahoma, where he was allowed to come home for 3 days every 2 weeks. The July 19, 1988 letter, he felt, offered the same job, which he felt was not a comparable one to the one he had when he was fired on March 12, 1988. Additionally, he had previously taken his wife and trailer, with him; Carroll's letter said that he could not do so on this occasion. In addition, when Sherlock had previously been involved in organizing employees in Idabel he told Carroll that they were not getting anywhere and they should not waste their time and resources continuing the campaign, and Carroll agreed. By reassigning him to the same campaign (in the July 19, 1988 letter) which they previously agreed would not be successful and stating that Sherlock's progress would be monitored, Sherlock was convinced that he was being ''set up for another fall.'' For all these reasons, he rejected the July 19, 1988 reinstatement offer. Sherlock testified that he rejected Carroll's August 19, 1989 reinstatement offer because of the third from the final paragraph (beginning: ''You are certainly aware'') which refers to the general president's right to assign international representatives to work in various parts of the country. Although this letter never specifically mentioned a location that Sherlock would be assigned (or reassigned) to, Sherlock testified that his interpretation of the letter is that he would be assigned out of town for 2 weeks at a time which, again, was not compatible with his position prior to March 12, 1988. He testified that this letter was ''. . . saying similar things in different words.'' He accepted the March 20 reinstatement offer because it does not talk about reassigning him to another area; ''it . . . just referred to assignment, not reassignment.'' Sherlock was asked by counsel for Respondent whether he understood from Carroll's March 20 letter that he could be reassigned to a different area of the country. He testified ''According to our constitution I could be, yes, but this was the same job description I had prior to my termination.''

Sherlock testified that he (as well as the other international representatives) understand that the general president of Respondent has the authority to assign them to various parts of the country, but only ''on a temporary campaign,'' he testified, not the long term campaign in Idabel that he referred to in his July 19, 1988 letter:

> Because no other rep on our staff is expected to go on the road for twelve days, home for two. It hasn't been the past practice, and I was being subjected to different job conditions than other representatives.

Carroll testified that sometime prior to July 19, 1988, he received a request from the regional director of the AFL–CIO in Tulsa, Oklahoma, stating:

> that he had received some telephone calls from this area wanting us to return to the area and try to organize the factories, that they had some other unions in the area that could give us some help. And I felt like that the best thing to do was to send the same representative back in there that was familiar with it to try to see if we could revive the efforts and maybe obtain the bargaining rights in that particular plant.

He testified, further, that he notified Sherlock of this assignment in order to cover this situation, while, at the same time, returning Sherlock to his position as international representative and settle the Board case. After Sherlock refused the reinstatement offer, he did not assign anyone else to attempt to organize these plants in Oklahoma. Respondent has an international representative in Oklahoma but she was not assigned to this task nor did Carroll assign two international representatives who had assisted Sherlock when he was in the area in 1987, because they were too busy with other work that they were performing. By his July 19, 1988 letter, he told Sherlock that he wanted him to go to Oklahoma to

attempt, again, to organize the company involved. This was not a permanent assignment:

> I intended to send him down there on a temporary basis. I didn't know how long it would be. Sometimes you can finish an organizing campaign fairly fast. Sometimes you can't. Sometimes they run for several months. So, it's impossible to predict how long it would be.

In support of its defense in this regard, Respondent moved into evidence a summary of international representatives[5] who worked outside of their areas during 1987 and 1988; this exhibit states that five worked outside of their area during this period. One worked a total of 2 days in this category; the other four worked between 21 and 41 days outside of their area during this period. However, the longest consecutive period that any of these representatives spent in one area was 10 days. The only out-of-area assignment that could compare with the Idabel assignment referred to in Carroll's July 19, 1988 letter to Sherlock was an assignment testified to by International Representative Lucy Gibby. She testified that in about 1985, she, Carroll, Sherlock and one other representative were assigned to a raid situation at a plant in Missouri. It lasted about 8 weeks and she was away for 2 weeks at a time and then home for a few days.

As stated, supra, it is the employer's burden to establish an diminution in a backpay award; this applies to establishing that a valid offer of reinstatement was made as well as establishing that the discriminatee made an inadequate search for interim employment. The order in the underlying case directed Respondent to offer Sherlock immediate and full reinstatement to his former position of employment or, if that position is not available, to a substantially equivalent position. Initially, it should be noted that Respondent has not established that Sherlock's position was no longer available; Jeffrey Roberts, Respondent's international representative in the area prior to August 1987, was apparently outside the area engaging in engineering work for Respondent. The issue is whether any of Carroll's letters to Sherlock prior to March 20 constituted unconditional offers of reinstatement to his prior position. I find that they did not. The July 19, 1988 letter presents a good example of a bad-faith offer of reinstatement. After stating that he would be reinstated at his former salary, effective August 1, 1988, in the third paragraph Carroll tells him that, effective August 1, 1988, he would be going to Idabel, Oklahoma, to attempt to organize a plant he was previously unsuccessful in organizing. The next paragraph states that he can only come home every other weekend. The following paragraph states that he (Carroll) will be monitoring Sherlock's progress in the campaign, while the final paragraph states that he should not take his trailer or his wife (as he had done previously) with him to Oklahoma. This is clearly not an unconditional offer of reinstatement to his former position; the only positive aspect of this offer is that it states that it is an unconditional offer of reinstatement and that it would be to his prior salary. The letter never refers to his former position as international representative for the Northeast area; rather, it tells him that he is to immediately report to Oklahoma and, apparently, stay there for an indefinite time. Not only is this letter unacceptable because it assigns him to a position that is different from the one he had just prior to March 12, 1988, and provided for numerous restrictions that Carroll probably knew Sherlock would find that objectionable, but also refers to the fact that Carroll would be monitoring his progress in the campaign. Since this was a campaign that had previously been unsuccessful, and one that Sherlock told Carroll they could not win, Sherlock had good cause to believe that this was a setup for a subsequent discharge. There is an additional reason why I find that this letter was not a valid offer of reinstatement. Such offers should also serve to reassure certain discriminatees that the respondent has altered its policy and will no longer discriminate against its employees for discriminatory reasons. *Art Metalcraft Plating Co.*, 133 NLRB 706 (1961). The administrative law judge in the underlying case found General Counsel's case to be ''compelling,'' while finding Respondent's reason for Sherlock's discharge to be ''flimsy and insubstantial.'' This situation called for a strong, unconditional reinstatement offer, which Carroll's July 19, 1988 letter clearly is not. Finally, I should state that I do not credit Carroll's testimony that he made this assignment to Sherlock based on a telephone call from the regional director of the AFL–CIO in Tulsa, Oklahoma, inviting Respondent to reattempt organizing the employees in Idabel, Oklahoma. The evidence is unmistakable in both the underlying and instant matter that there was, and is, animus between Carroll and Sherlock. Additionally, I find it puzzling that after Sherlock refused the Oklahoma assignment, Carroll did not assign any of the other international representatives to this assignment.

Respondent next contends that Carroll's August 19, 1988 letter to Sherlock represented an unconditional offer of reinstatement, ending any backpay obligation to Sherlock. There are two aspects of this letter that make it unacceptable. At the conclusion of the fourth paragraph of the letter, Carroll refers to Sherlock's poor performance as international representative between September 1, 1987, and March 1, 1988, a claim rejected by the administrative law judge in the underlying case. Additionally, the letter refers to Carroll's right to assign international representatives to engage in organizing in various parts of the country. Although this letter is not as objectionable as the prior letter, it is still not ''unequivocal, specific and unconditional for it to remedy the employer's unfair labor practices.'' *Tri-State Truck Service*, 241 NLRB 225 (1979). I therefore find that Sherlock's backpay continued to run until March 27, as alleged in the compliance specification.

IV. THE UNFAIR LABOR PRACTICES

There are two aspects to the unfair labor practice allegations which were consolidated with the compliance specification. The first involves Sherlock's employment with Thermal, where he was employed on a part-time basis prior to his termination on March 12, 1988, and where he resumed working in September 1988 and continued working, for a period, after his reinstatement in March. Respondent contends that such ''employment'' (as distinguished from owning a business) is prohibited by Respondent and by letters dated July 26 and September 6, Carroll notified Sherlock of such prohibition; these letters are alleged to violate Section 8(a)(1)

[5] Sherlock admits that international representatives are, at times, assigned outside of their area. His objection to the July and August 1988 assignment relates to the length of time and the stated restrictions that were involved in the assignment.

and (4) of the Act. The other aspect of this case is a series of letters from Carroll to Sherlock threatening him with termination because of poor performance as an international representative. These letters are also alleged to result from his prior Board action and proceeding, and therefore are alleged to violate Section 8(a)(1) and (4) of the Act.

It is undisputed that at least two international representatives owned and operated businesses simultaneous to their position as international representative for Respondent, with the knowledge of Respondent's agents. In this regard, Phillip Simmons, who had been employed as an international representative by Respondent from 1981 through 1987, testified that during his early years of employment with the Respondent he bought and sold automobiles and was the director of Music at a local church (a paying position). He discussed these jobs with Little, Carroll, and his predecessor. In about 1986, he and his wife opened a store in his hometown (the same town where Little lived) where they made and sold drapes. In fact, they made drapes for Little's apartment and they supplied the curtains for Respondent's convention in 1987, after approval at Respondent's board meeting. During this meeting, Little informed the Board that Simmons and his wife were in the drapery business and could supply the drapes for the convention, absent objection; there was none. Simmons did the actual measurement for the drapes and put them up as well. Both he and his wife worked in the store and both sewed the drapes. When he was out of town on Respondent's business, his wife operated the store. He spent, on the average, 15 to 20 hours a week in the store. While he was traveling as part of his job with Respondent, Simmons, at times inspected and/or purchased fabric while he was in the area. He discussed this with Little who never raised an objection. During this period, at least two other international representatives, Tom Agan and Lucy Gibby owned their own businesses. Agan owned some car washing operations as well as a craft store and Gibby and her husband owned an upholstery store. He discussed both with Little, who voiced no objection.

Sherlock began working part-time for Thermal in about September 1987; he learned of the position through his brother, who is employed there. The owner asked him if he would be interested in part-time employment there installing and repairing heating and air conditioning units. Thermal's records (beginning in January 1988) establish that from January 1988 through his discharge he worked from 8 to 32 hours weekly, for an average of 22 hours a week. After being reinstated by Respondent, Sherlock continued to work for Thermal until late June; during this period his hours ranged from a low of 8 to a high of 16, for an average of 11 hours a week. On the days that he worked for Thermal, his hours were usually 7 a.m. until 3:30 p.m. He testified that the work he performed for Thermal did not interfere with his job responsibilities for Respondent. During cross-examination, Sherlock was shown his work records regularly submitted to Respondent which showed little or no work performed on days that he worked for Thermal. He testified that when he was hired, he was told:

> you're to service this area. We don't care how long it takes. You make your own schedule. As long as we don't have any problems or hear about any problem, we don't care how you handle it.

He also testified that even on those days that he worked 8 hours for Thermal, he sometimes met with employees at nearby companies at lunch time or after work; at other times, he did his paperwork for Respondent in the evening.

Sherlock never told Carroll about his employment at Thermal; Carroll testified that the first he learned of it was sometime in 1989 when the Board informed Respondent's counsel of it.[6] He testified that on learning this,

> I was quite upset about it because in my 40 years of experience working for the international union, I've never known anyone who had a second employer. Several of them have had businesses or things like that, but no second employer.
>
> My policy is that everybody is a full-time representative and must spend all their time working for the international union because of the peculiarities of our work . . . And it is a full-time job. it's not an eight hour-a-day job.

By letter dated July 26, Carroll wrote to Sherlock:

> It has come to my attention that during the period of time that you were employed as international representative by this International Union, you were working at other employment for another employer. Such action on your part was unknown to the officers of the International Union, and you certainly never advised the General President or the General Secretary-Treasurer of the International Union, or its Executive Board, of the fact that you were also engaged in other employment in addition to your performance of your duties as either a member of the General Executive Board or as an international representative.
>
> I am anxious to discover whether you are still engaged in employment by another party. Please advise me whether you have such other employment, the name and address of your employer, if one exists, and the amount of time or the number of hours or days per week which you devote to such outside employment.
>
> I want to advise you that employment as an International Representative of this International Union is a full-time job. It is not simply a five (5) day a week job; it is a seven (7) day a week job. Any holding of any outside employment is totally inconsistent with the performance of your duties and obligations as an International Representative of this International Union.
>
> Therefore, please advise me whether you are presently enjoying such outside employment and provide the information set forth above. If you have such outside employment, you are directed immediately to cease and desist from such outside employment and advise me in writing that you have done so. I want to make crystal clear to you that your job as an International Representative of this International Union does not contemplate or permit your engaging in any outside employment, and your continuation of any such outside employment will be grounds for your termination.

By letter dated August 15, Sherlock responded:

[6] The compliance specification, which issued on August 30, mentions his employment at Thermal.

> This letter is in reply to your letter to me dated July 26, 1989 regarding my outside employment.
>
> When I was hired by the United Garment Workers there was no requirement implying or otherwise forbidding outside employment. During my thirteen years of employment there have been occasions where staff representatives have held outside employment. In one such case the International Union and the General Secretary hired work to be done by that representative.
>
> I have been and am presently ''enjoying'' such outside employment. I am working for an employer who allows me to pick and chose the days I work along with the number of hours I work.
>
> Since returning to the staff in March of 1989 I have worked less than an average of eight hours per week for this employer.
>
> I have at no time and will at no time in the future allow my outside employment to interfere with my job for the United Garment Workers.
>
> Please be advised that I have filed charges against the United Garment Workers with the National Labor Relations Board regarding your letter dated July 26, 1989 because I feel it is discrimination applied against me for filing and also winning case 3-CA-14240 with the N.L.R.B.
>
> I request that the above mentioned and other subtle forms of harassment cease immediately so as to avoid my filing of further charges.

By letter dated September 6, Carroll wrote:

> This letter is in response to your letter to me of August 15, 1989 concerning outside employment.
>
> Contrary to your statement, there has always been an understanding that all International Representatives of the United Garment Workers of America will be full-time employees of the Union. Such International Representatives are not allowed to have outside employment because of the fact that such outside employment obviously interferes with their duties and responsibilities for the International Union. An International Representative simply cannot be employed by a third party and maintain his duties and responsibilities to the International Union.
>
> Your statement that other International Representatives have held outside employment is simply incorrect. No other International Representative has any such outside employment and no other International Representative is permitted to have such outside employment.
>
> I note your statement that you have worked less than an average of eight (98) hours per week for an outside employer. You are directed to cease and desist from such employment as the continuation of such employment is inconsistent with your obligations as an International Representative of this International Union.
>
> In my prior communication to you on this subject, I requested that you advise me of the name of your employer and the nature of such employment. I would also like to be advised of the dates of which you have worked for such employer and the duties you have performed.
>
> It is perfectly obvious that your engaging in outside employment by a third party is inconsistent with your obligations as an International Representative. You must always be available to service those Local Unions assigned to you, and your duties also consist of organizing at least 50% of your time. I need not remind you of the noticeable lack of success which you have had in organizing efforts since your return to the staff in March of 1989. I have previously warned you about your inactivity and lack of success on this score, and this letter constitutes a repetition of such warnings.

Carroll testified that he knows of no other international representative employed by Respondent who has ''outside employment''; he knows of others who had ''other outside interests, but not of a second employer, second boss.'' His ''understanding'' was that Simmons assisted his wife in a curtain shop that she owned, but that he was always available, by phone, when needed. Additionally, Simmons left Respondent's employ approximately a month after Carroll became president. Additionally, Carroll testified that while he was an international representative someone told him that Agar had bought a laundromat. ''But my understanding is that he sold that a long time ago and he doesn't have anything like that at the present time, not since I've been president.'' Prior to the July 26 letter to Sherlock, he never instructed any employee of Respondent that they were precluded from outside employment; since he knew of no one who had a second employer he didn't feel that it was necessary.

The final allegation is that on about June 20, August 9 and September 26, Respondent, by Carroll, issued written warning to Sherlock in retaliation for his prior Board activity, in violation of Section 8(a)(1) and (4) of the Act. As stated above after the 1987 election, Sherlock told Carroll that they should keep their communications in writing; this recommendation went a long way to filling the record of the hearing. Between Sherlock's reinstatement in March, and Carroll's letter of September 26 containing a final warning, letters containing a total of 35 pages passed between them. For the sake of brevity, not all these letters will be referred to or even quoted from. Stated simply, Respondent defends that Carroll gave Sherlock these warnings because of his poor performance as an international representative; he was doing no organizing and was deficient, as well, in all areas of his position.

Sherlock's understanding with Carroll was that as an International representative in the northeast region, he would devote 50 percent of his time to organizing. He testified that combined with travel time (the plants ranged from 20 miles to 425 miles from his home), he spent in excess of 50 percent of his time organizing. The other part of his job (as well as the job of the other International representatives) was servicing the Respondent's members in the area. At the time he returned, there were about 500 members in the area; only one other region had such a small number of members.[7] By

[7] Respondent produced evidence showing that from March through December, the local unions in Sherlock's region contributed $25,000 in per-capita tax to the Respondent. During the same period, Sherlock's payroll costs totaled $33,000.

letter dated April 11, Carroll wrote Sherlock a two page letter stating, inter alia:

> I have reviewed your reports for the week ending April 8, 1989. I have paid particular attention to your report on organizing the plant of C.B. Sports in Glens Falls, New York.
>
> As I emphasized to you in my letter of March 31, 1989, your most important activity will be the organizing of new plants and the securing of new members. Our financial records disclose that the Local Unions you are presently servicing do not pay sufficient per capita tax to support the employment of an International Representative. Therefore, it is essential you engage in organizing activity so as to build up the membership in your area and to justify the continuation of an International Representative to service the Local Unions in New York and Pennsylvania.
>
> I also note that in February and May of 1987 your reports disclose that you handbilled and visited the C.B. Sports Plant in Glens Falls, New York. At that time the plant was apparently not yet completed, and I do not know whether the employer had a full complement of employees. However, from your report for the week ending April 8, 1989, it appears that the plant is in operation, and organizing activities should certainly be undertaken at that location.

The letter then requests that Sherlock provide Carroll with information regarding this employer and to attempt to organize its employees, stating: ''Your organizing reports [weekly reports submitted to Respondent] will show, of course, the extent of your activity and the results obtained.'' The letter also requests that Sherlock investigate an employer's delinquency in forwarding checked off dues to Respondent and advised him that one local in his region had not forwarded per capita dues to Respondent for a year. Sherlock testified that he complied with the instructions of this letter by sending Respondent the reports Carroll requested and attempted to organize the employees of C.B. Sports by speaking to them after work, although he had not obtained any signed authorization cards. In fact, he did not receive his only signed card from an employee of this employer until about mid-November. By letter dated May 8 (which Carroll began by stating: ''I have reviewed your last three week's reports.'') Carroll answered a prior querry from Sherlock about obtaining assistance in organizing. Carroll stated: ''The answer is, you need no help in organizing, at least until you petition the NLRB for an election. At that point, if the plant has 75 employees or more, we will allow you to take two people out of any of the plants in your area . . . to assist you.'' Sherlock testified that, in the past, Respondent always assigned at least two international representatives (rather than employees of a plant) to an organizing campaign. By letter dated June 3, Sherlock answered the questions posed by Carroll in his May 3 letter; the letter states that he had spoken to employees of C. B. Sport, but is not optimistic about chances there because of financial difficulties and layoffs at the company. By letter dated June 20, Carroll wrote to Sherlock:

> To say that your answers to the questions that I asked you on May 8, 1989 are unsatisfactory would be an understatement.
>
> Regarding Troy Guild, there is no excuse for waiting. Jeff can give you the names of the workers he has contacted over the phone. Also, this is the plant you used to work in and, I know, you know some people working in the factory. Why have you not contacted some of them?
>
> Regarding C.B. Sport, according to your Organizer's Initial Report, item six (6), on the question ''Has anyone ever tried to organize this plant?,'' your answer was, ''ILGWU and still trying.'' Then on question fourteen (14), ''Why should we start a campaign at this plant?,'' you left blank. According to your reports, you have not signed up any employees on authorization cards. If you are not making progress, start working on another unorganized plant. You know to do this without my having to tell you. Also, if the ILGWU is involved in a campaign, we don't need to intervene.
>
> You said you disagree with my policy of providing help in organizing that was set forth in my letter of May 8th. You further stated that I said no one should organize alone. This statement is not true. Any organizer ''worth his salt'' should be able to start a campaign and bring it to the point of petitioning the NLRB for an election (30%). The policy I set forth, after this point, is outlined in my letter of May 8th, 1989. It is very important that we develop leadership in all sections of the country. Am I to understand that you will not wholeheartedly follow the policy outlined in my letter?
>
> On your Organizer's Report, week ending June 3, 1989, you show ''Tuesday, C.B. Sport, Glens Falls, New York,'' and under ''Organizing Activities,'' you only say, ''parking lot.'' What does this mean? Also, on your Organizing Report, week ending June 10, 1989, you show on Monday, ''C.B. Sport, Glens Falls, New York,'' but did not answer any of the questions under ''Organizing Activities.'' Why?
>
> You made no comments on the other side of these forms as required in our letter to you of December 3, 1987 (copy enclosed to remind you)—see paragraph two (2). While this letter refers primarily to service work, it is required in organizing.
>
> Regarding Robdeb Manufacturing (Temco), enclosed is copy of letter I received from Jeff on February 25th, 1989, regarding money owed to Local 482's treasury. This is the only information I have. It is up to you to investigate further, and give me a detailed report.
>
> This is a warning that you are not doing the job you should be doing, and you are not reporting your activities properly. I do not intend to continue indefinitely, to put up with this type of reporting.

Sherlock answered the allegations in this letter in a letter to Carroll dated July 31. The letter states:

> This letter is in response to your letter dated June 20, 1989, in order to simplify my response I will discuss your letter paragraph by paragraph.
>
> Paragraph two (2) Regarding Troy Guild; I believe that if you took the time to review my application you

would find that I have never *worked* for Troy Guild. Your assumption that ''you know some of the people working in the factory'' is as far off the mark as was your statement ''this is the plant you used to work in.'' For your information access to the cutting department is gained through a stairway which isolated from the rest area I was accompanied by the Plant Manager. I agree that Jeff could give me the names over the phone, but if he wants to contact them first what choice do I have. I have not tried handbilling or talking to employees outside of work because even as you must be aware of, as former Director of Organizing, that the best way to organize is from within, without management knowing. In the situation at Troy Guild with us already representing the cutters, I feel it is in our best interest to keep management in the dark as long as possible regarding organizing efforts.

Paragraph three (3) Regarding C.B. Sport; in my letter to you dated June 3, 1989 paragraph five (5) I stated that at this time with a lot of layoffs and financial problems, the employees of C. B. Sport are more concerned with their jobs than with joining a Union but I feel we must maintain a presence because at least the employees are talking to me. I still feel that we should maintain a presence in the area because with the company receiving a grant, as I reported in my letter dated June 3, 1989, once the employees are back at work they may become more interested in a union. Maybe I did not make it clear enough in my report to you when I said the ILGWU is in the area, that they are having no success in getting anyone interested in the Union either. I feel that if we stay involved, we will be the Union the people chose to sign up with, if not we can pull out at a later date.

Paragraph four (4) organizing help, I have no problem in following the internationals organizing policy ''wholeheartedly.'' Apparently, since you have gone from the position of Director of Organizing to General President you have changed your position on ''in plant organizing,'' which is your right. I still respectfully disagree with your new policy which does not provide help to representatives in organizing. As I stated previously, even though I disagree I will follow your policy ''wholeheartedly.''

Paragraph five (5) Organizer's Report; I have been filling out my weekly reports the same since January 9, 1988 through June 20, 1989. Having gotten no complaints from the International during that period I assumed they were filled out to the International's satisfactory. I will as per your request go into more detail.

Paragraph six (6) Robdeb Mfg.; a report regarding dues owed by Robdeb Mfg. will follow under separate cover.

Paragraph seven (7) Warning: I take exception to your warning, what do you mean by your statement ''you are not doing the job you should be doing'' it is vague and indistinct. Your statement ''I do not intend to continue indefinitely, to put up with this type of reporting'' is also vague.

I request a more detailed explanation regarding your warning and I also request in writing any policy changes in Weekly Reporting procedures.

Between the above two letters, on July 10, Carroll wrote a three page letter to Carroll regarding one of Respondent's local unions in Rockland County, New York. The employer was delinquent in its payments to Respondent's retirement and severance fund as well as back dues to the local union. Carroll instructed Sherlock to do a number of things to correct this situation, concluding: ''I expect you to take immediate action on these subjects and to give me a full report without delay.'' By letter dated August 3, Sherlock reported on his activities in each regard including a check of $500 from the employer as partial payment for its delinquencies. The letter concludes: ''If you have any questions or comments, or if you are not satisfied with my handling of the situation, please advise.'' By letter dated August 7, Carroll stated that Sherlock did not say anything about the contract for the company which was supposed to expire on June 30; Carroll asked for this information—''I expect a reply to this letter upon receipt of same.''

By letter dated August 15, Sherlock informed Carroll that the answers to these questions could be found in specific letters and weekly reports that he had prepared. By letter dated August 9, Carroll wrote to Sherlock, inter alia:[8]

> This letter is in response to your letter to me of July 31, 1989, and is also intended to follow-up on a number of prior communications which were sent to you concerning your work as an International Representative of this International Union and the nature of your performance of your duties.
>
> I do not want to repeat in this letter the history of our prior discussions, but you are certainly well aware of the fact that it is absolutely essential for you to engage in organizing activity, consuming at least 50% of your time, and to organize new members in your area. You are well aware of the fact that the number of members which you are servicing do not support the employment of an International Representative by this International Union. You are servicing less than 500 members, and I am sure that you can compare the per capita tax which they pay to the salary and other benefits which you receive. In addition, of course, their per capita tax goes to support the International Union, the International Office and the other expenses which the International Union has, in addition to your salary as International Representative.
>
> Therefore, it is absolutely essential that you be successful in organizing employees and in adding members in your area. I am not at all satisfied with the efforts that you have made to organize new plants. Your organizing reports do not indicate a diligent application of your time and effort toward such organizing. If you are not achieving success at C. B. Sport, then find another location in another plant where employees may be interested in being organized.
>
> I do not accept your so-called ''exception'' to the warning contained in my letter of June 20, 1989. In that letter, I warned you that you are not doing the job you should be doing, and you are not reporting your activities properly. The job that you should be doing includes

[8] In the interest of brevity, I have omitted about one page of the letter which refers to Carroll's unhappiness with certain of Sherlock's organizing and servicing activities.

the organizing of employees and new plants; it does not appear to me that you are doing sufficient work in this regard. There is nothing vague about my statements, and I think they are clear and specific.

Despite my letter of June 20, 1989, and the warning in that letter, you have continued to ignore your responsibility and obligation to organize and to fulfill the duties and responsibilities imposed upon you. This International Union will not continue to support your inactivity and your failure to perform the duties imposed upon you in your position as International Representative. If you do not engage in organizing and increasing our membership in the area you are servicing, we shall have to consider other action which might adversely affect your employment. You may consider this communication to be a second warning which I trust you will observe and take to heart.

By letter dated September 26, Carroll wrote Sherlock:

> I have written to you on a number of occasions concerning the necessity of your organizing and increasing our membership in the area that you were servicing. In my letter to you of June 10, 1989, I advised you that the letter was a warning that you are not doing the job you should be doing. In my letter to you of August 9, 1989, I told you that you were receiving a second warning concerning your responsibility and obligation to organize.
>
> Your reports to this office since my letter to you of August 9, 1989 shows no results and no positive action in regard to any organizing campaign. It appears that you are either not devoting yourself to organizing activity or are not performing organizing duties in an appropriate fashion. You are certainly an experienced organizer, but in the more than twelve months that you have been assigned to spend at least half your time organizing, you have not secured a single signed authorization card.
>
> Therefore, this letter constitutes a *final warning*. You have been told repeatedly that it is essential that our membership be increased in your area in order to justify your employment as a International Representative. You are well aware of the fact that the per capita taxes paid by the Local Unions you service do not even pay your salary, expenses and fringe benefits. Such per capita taxes, also, of course, support the International Office and its functions. For this reason you were told in August 1987, and have been repeatedly told since then, that you must organize and add to our membership. To date, you have failed to fulfill this responsibility.
>
> This letter is a *final warning* to you of your responsibility and obligation. The International Union will not tolerate any further disregard on your part.

As stated, supra, when Sherlock returned to the Northeast region in 1987, it comprised approximately 500 members. Sherlock testified that at the time of the hearing the region comprised between 450 and 500 members, although an undated form of Respondent states that it contained 421 members.[9] Since returning to the Respondent's employ, Sherlock obtained one signed authorization card from an employee of C.B. Sport and one card from an employee of another nonunion employer. During this period, he has (obviously) filed no petitions with the Board.

Carroll testified that he sent Sherlock the June 20, August 9, and September 26 letters because, ''he was not doing his job, was not accomplishing anything, absolutely nothing, so far as organizing is concerned.'' When there was no improvement after the June 20 letter, he sent Sherlock the August 9 letter. He testified that there was no connection between the letters and the charges Sherlock filed with the Board: ''I issued those letters in order to emphasize to him the importance and the necessity to add more membership to this particular area.'' Carroll testified further that Sherlock's predecessor in the Northeast region was Jeff Roberts, who was assigned to service the same number of shops as Sherlock, and did some engineering work for Respondent, as well. During Roberts' tenure, he also had no success in organizing employers in the region; he was never disciplined or reprimanded for this lack of success.

Respondent defends that the warnings to Sherlock were solely the result of his lack of success in organizing and were totally unrelated to his Board actions. Thus, in his brief, counsel for Respondent states:

> Despite his past history and past experience in organizing, the fact is that during the twelve months that he worked for the Union between August 1987 to March 1988 and from March 1989 through September 1989, Sherlock obtained only one signed authorization card during his supposed organizing forays. Certainly, as a former Director of Organizing, the Union had every right to believe that Sherlock had the ability to successfully organize. To the extent that he obtained only one authorization card, it is clear that we are not dealing with a lack of ability, but rather with a lack of desire.

In the underlying case, Respondent also defended that Sherlock was terminated because he was performing inadequately as an organizer. The administrative law judge found that although Sherlock ''did not engage in a significant amount of organizing activities,'' no other representative achieved any better results than he did for the period in question, August 1987 through March 1988. Thus, for that period, the administrative law judge concluded: ''Therefore, to the extent Respondent seeks to measure work effort by results, the record refutes the claim that Sherlock was any more deficient than any other Union organizer.'' Counsel for Respondent, in his brief, seeks to differentiate the instant matter.

> Since the time of that hearing before Judge Bennett, the circumstances have changed and the record in this case was replete with instances of organizing activities successfully engaged in by other international representatives. Some six campaigns had occurred in that time that had lead to either petitions or card checks.

[9] According to Respondent's records, the number of members serviced by each international representative ranged from 421 for Sherlock to 2283 for Agan.

> Moreover, there had been other organizing activities that, while not successful, at least had been attempted.

It is therefore necessary to examine the results of the organizing activities of Sherlock (admittedly meager) with the results of the other international representatives, for the period of March 27 (when he returned) through September 26 (the date of his final warning). Simmons testified that during the period of his employ with Respondent (1981 through 1987) he knew of only two or three Board petitions filed by the Respondent, and Respondent lost the Board elections. Each of these organizing attempts involved a large number of international representatives; in fact, to his knowledge; all organizing involved more than one representative. Carroll testified that in 1989, International Representative Ethel Forsythe began a campaign in White House, Tennessee; she obtained some signed authorization cards from employees and then Carroll assigned other representatives to assist her. A petition was filed with the Board and the Respondent won the election. Carroll also testified that (at an unspecified time) International Representative Charlie Boyd began a campaign in Williamsburg, Kentucky; after he obtained signed authorization cards from 30 percent of the employer's employees and filed a petition with the Board, Carroll sent other representatives to assist him. Respondent lost the election and filed unfair labor practice charges with the Board, which issued a complaint in the matter. At a plant in Auburn, Nebraska, International Representative Tim Fitzpatrick obtained signed authorization cards (also at an unspecified time) and obtained recognition from the employer on the basis of a card check. Carroll next testified about a campaign (time unspecified) in Dalton, Georgia commenced by International Representative Dave Johnson. With the assistance of two other international representatives and some people from the local union, he obtained enough cards to file a petition and obtain a Board election, which Respondent lost. International Representative Sue Cawyer began a campaign in Wagoner, Oklahoma, at an unspecified time. With the assistance of some local union members, she obtained signed authorization cards and recognition based on those cards. There was also a petition filed with the Board (at an unspecified time) for a plant in Camden, Tennessee. This plant was originally organized by two organizers recently hired by Carroll solely for organizing purposes. At a certain point, Boyd was sent to assist them. Respondent won the election. Of these six above-mentioned employers (and campaigns) five (all but Williamsburg) involved ''sister plants,'' i.e., a plant that Respondent had a contract with plants of the employer at a different location.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth the rule to be applied in discrimination cases such as the instant matter: ''First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.''

In making findings under *Wright Line*, it is helpful to examine some of the findings of the administrative law judge in the underlying case. The judge found Carroll's testimony ''untrustworthy'' and incredible and found Respondent's defense that Sherlock was terminated for valid business reasons ''flimsy and unsubstantial'' while finding General Counsel's case ''compelling.''

Examining initially the institution of the rule against outside employment and the resulting warnings to Sherlock regarding this rule, the evidence establishes that neither Carroll nor his predecessor ever formulated or announced a prohibition against outside employment or the ownership of a business by international representatives prior to July 26, although the evidence is clear that Carroll and Little were aware of Simmons, Gibby, and Agan's business interests. Respondent attempts to differentiate between outside employment and business ownership. I reject this distinction. The record establishes that Simmons spent considerable time on his personal business while on the road to the knowledge of, at least, Little. It appears that Sherlock spent no more time in his employment with Thermal than Simmons did in his church employment and his automobile and drapery businesses. This, together with Respondent's animus toward Sherlock clearly documented in the prior Decision, establishes that General Counsel has satisfied his burden that the warnings of July 26 and September 6 resulted from his Board actions. As Respondent has not sustained its burden that it would have taken this action even in the absence of Sherlock's activities (after all, there had never been any prior warnings regarding outside employment) I find that these warnings and the institution of the rule, violate Section 8(a)(1) and (4) of the Act. That is not to say, of course, that a union cannot prohibit its employees from maintaining outside business interests or other employment; however, when a union institutes such a rule in retaliation for an employee's protected activities, such activity is proscribed by the Act.

The final allegation is that the warnings of June 20, August 9, and September 26 were also in retaliation for his Board actions; Respondent defends that they were solely the result of his inadequate organizing activities. In support of this defense, Carroll testified to six organizing campaigns by the Union. However, only one of these campaigns clearly took place between Sherlock's reinstatement and the warnings; the time of the other campaigns was not testified to. Further, six organizing campaigns is not so inspiring when one considers that Respondent employs 14 international representatives and 2 full-time organizers. Additionally, Roberts, Sherlock's predecessor, was no more successful in organizing, yet he was never given any warnings for his deficiency. Finally, I find particularly interesting that Carroll's first letter to Sherlock referring to his deficient organizing is dated April 11, only 2 weeks after his reinstatement. Sherlock had been out for over a year; within 2 weeks after returning, he is already being criticized for his work. All these facts, together with the animus Respondent previously displayed toward Sherlock, establishes that the warnings were motivated by his Board activity; I therefore find that they violate Section 8(a)(1) and (4) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, United Garment Workers of America, AFL–CIO is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By instituting a rule prohibiting Sherlock from engaging in outside employment, and threatening him with termination because he engaged in such outside employment, and by is-

suing warnings and a final warning to Sherlock, Respondent discriminated against Sherlock for filing charges with the Board, in violation of Section 8(a)(1) and (4) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, Respondent shall notify Sherlock that it is withdrawing and rescinding its threats of termination dated July 26 and September 6, 1989, as well as its warnings and ''final warning'' dated June 20, August 9, and September 26, 1989, and will remove from its files any reference to such threats and warnings and will notify Sherlock of the removal and that these warnings and threats will not be used as a basis for future action against him. Additionally, Respondent will notify Sherlock that until it establishes a lawful rule prohibiting outside employment by its international representatives, it will take no action to prohibit him from engaging in said employment.

Finally, as the international representatives employed by Respondent are located throughout the United States and, apparently, visit Respondent's headquarters infrequently, the usual posting of the notice will be ineffective in reaching these employees. I shall therefore recommend that, in addition to posting the attached notice at its facility in Hermitage, Tennessee, Respondent shall mail a copy of this notice to each of its international representatives.

On these findings of fact and conclusions of law and on the entire record,[10] I issue the following recommended[11] (first regarding the backpay case, Case 3–CA–14240, and then the unfair labor practice case, Cases 3–CA–15120 and 3–CA–15207)

ORDER

The Respondent, United Garment Workers of America, AFL–CIO, Hermitage, Tennessee, its officers, agents, and representatives, shall pay to Sherlock and the Fund the amounts set forth below, plus interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987): Warren A. Sherlock—$25,677.60; United Garment Workers of America, Retirement and Severance Fund—$2,614.15.

IT IS FUTHER ORDERED that the Respondent, United Garment Workers of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Instituting a rule prohibiting its employees from engaging in outside employment and threatening its employees with termination for engaging in such outside employment, and issuing warnings and final warnings to its employees. when such actions are in retaliation for their filing charges with the Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the threats and warnings issued to Sherlock and notify him in writing that this has been done, and that evidence of this will not be used as a basis for future action against him; and notify Sherlock that at the present time, it has no rule against outside employment.

(b) Mail a copy of the attached notice to all international representatives at their home addresses, and post it at its facility in Hermitage, Tennessee, copies of the attached notice marked ''Appendix.''[12] on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[10] General Counsel's unopposed motion to correct transcript (included in his Br. dated March 22, 1990) is granted, with the exception that the third item should read: ''Page 322, Line 2.''

[11] In the event no exceptions are filed provided as by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''